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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re J. B., a Person Coming Under the Juvenile Court Law.	C055674
THE PEOPLE, Plaintiff and Respondent, v. J. B., Defendant and Appellant.	(Super. Ct. No. JV114429)

The minor, J. B., was committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF) after he admitted to one of four charged counts of lewd and lascivious conduct with a child under the age of 14 years. The remaining counts were dismissed. The minor appeals on two grounds. He asserts the commitment was unauthorized under an amendment to Welfare and Institutions Code

section 733, which did not become effective until after the commitment was ordered. (Welf. & Inst. Code, § 733, subd. (c).)[1] And he argues that in exercising its discretion, the trial court improperly relied on its own familiarity with sexual offender programs within the DJF. We will conclude that his statutory argument fails because the statute applies prospectively only and that the court did not improperly rely on ex parte communications but simply applied its broad range of experience with the juvenile justice system. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The minor was taken into custody on June 8, 2003, when he was 15 years old, after kissing a five-year-old girl and asking to see her crotch. He was adjudged a ward of the juvenile court and placed at Martins Achievement Place. During therapy two years later, the minor revealed that he had sexually assaulted other victims. The ensuing investigation led to the disclosure that he had had vaginal intercourse, anal intercourse, and oral copulation with his mother's boyfriend's granddaughters four to five years earlier, when the girls were four and eight years old. He threatened to kill the four year old if she told anyone.

According to information contained in the probation report, the acts of molestation took place over a five-day period. On day one, he digitally penetrated the vagina of the eight-year-

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

old victim after removing her clothing and then inserted his penis into her vagina. On day two, he placed his mouth and tongue against the inside of the vagina of the same victim after removing her panties. He also admitted to inserting his penis into her anus. On day three, he had the eight year old place her mouth over his penis. On day four, he attempted to insert his penis into the four-year-old victim's vagina but withdrew after she yelled at him, fearing the noise would attract the attention of adults. He then rolled her onto her side and inserted his penis into her anus twice. On day five, he again inserted his penis into the anus of the four year old.

The district attorney filed a section 602 petition alleging the minor had committed four counts of lewd and lascivious conduct with two children, both under the age of 14. He admitted one count; the remaining counts were dismissed, and a contested dispositional hearing followed. The juvenile court committed him to the DJF for the maximum term of four years.

DISCUSSION

I

When a minor is adjudged a ward of the court under section 602, the court is provided with a variety of detention options, including commitment to a juvenile home, ranch, camp, forestry camp, or county juvenile hall. (§ 730, subd. (a).) In addition, the court may commit the minor to the DJF. As amended in 2007, section 731 allows the juvenile court to commit a ward to the DJF "if the ward has committed an offense described in subdivision (b) of Section 707 and is not otherwise ineligible

for commitment to the division under Section 733." (§ 731, subd. (a)(4).)

Section 733 imposes restrictions on the commitment of minors to the DJF. Wards under the age of 11 and wards suffering from contagious or infectious diseases cannot be committed to the DJF, and on and after September 1, 2007, the restrictions contained in subdivision (c) of section 733 became effective: "The ward has been or is adjudged a ward of the court pursuant to [Welfare and Institutions Code] Section 602, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of [Welfare and Institutions Code] Section 707, unless the offense is a sex offense set forth in paragraph (3) of subdivision (d) of Section 290 of the Penal Code." Thus, a ward whose most recent offense is not a section 707, subdivision (b) offense cannot be committed to the DJF unless the offense is a sex offense set forth in paragraph (3) of subdivision (d) of section 290 of the Penal Code.[2]

The minor argues that because the 2007 amendment mitigates punishment, he is a beneficiary of its terms, even though he committed the offenses and the dispositional hearing was held before the amendments were enacted. His argument is based on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). The Supreme Court

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[2] Subdivision (c) of Welfare and Institutions Code section 733 was amended in 2008; the statute now refers to Penal Code section 290.008, subdivision (c).

ruled in *Estrada* that "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Estrada, supra,* at p. 748.) The court reasoned that "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Id.* at p. 745.) To the extent that the 2007 amendment is construed as a measure mitigating punishment, the amendment should be applied retroactively unless there is a "savings clause."

The Attorney General argues the amendments do not mitigate punishment but simply specify where a juvenile offender should be housed. We agree. The amendments do not lessen the minor's term of confinement. Unlike the statutory amendment in *Estrada*, *supra*, 63 Cal.2d at pp. 742-743, 751), which reduced the minimum sentence for a nonviolent escape and thus decreased Estrada's punishment, the amendments involved in the present case do not alter the maximum or minimum term the minor will be required to serve. The court in *In re N.D.* (2008) 167 Cal.App.4th 885, 891-892 suggested the amendments may have reflected the Legislature's concern with the costs of juvenile incarceration rather than with the severity of sentences. Whatever the

motivation, the effect of the Legislature's action was to leave the existing punishment intact while restricting where certain offenders may be confined.

We agree with the reasoning and conclusion reached in *In re N.D.*, and like that court, "We hold that the rule of *Estrada* does not apply to this case. The amendments to sections 731 and 733 do not mitigate any punishment, for they do not reduce the amount of time any juvenile offender is confined. Instead, they limit the places in which juveniles committing certain offenses can be confined. Nothing in the statutes indicates an intention on the part of the Legislature to reduce the severity of punishment for any offense. The parties have not pointed to anything in the legislative history reflecting this intention and we have found nothing in our own research that does so." (*In re N.D.*, *supra*, 167 Cal.App.4th at p. 891.) To the same effect is the decision in *In re Carl N.* (2008) 160 Cal.App.4th 423, 438.

Accordingly, we apply the usual rule that "A new or amended statute applies prospectively only, unless the Legislature clearly expresses an intent that it operate retroactively." (*People v. Ledesma* (2006) 39 Cal.4th 641, 664.) Here, the Legislature specified that section 731, which was chaptered on September 29, 2007 (see Stats. 2007, ch. 257, § 15), "shall go into immediate effect" and section 733 "shall become operative on September 1, 2007" (see Stats. 2007, ch. 175, § 37). Section 733 does not affect the choices available to the

juvenile court in the present case, where the commitment was made prior to the statute's operative date.

II

The appropriate disposition in this case was hotly contested. The prosecution urged the court to follow the probation department's recommendation to commit the minor to the DJF, where he could continue to receive sex offender treatment. The defense challenged the adequacy of the DJF treatment program and argued that the court should grant the minor probation so he could receive further intensive treatment in the community as recommended by the court-appointed psychologist.

After commending counsel for the quality of their presentations, the court stated that it relied on all the evidence presented at the dispositional hearing, including the parties' motions, the psychological evaluations by the mental health experts, the probation report, the social study reports, the six-month placement review reports, the law enforcement reports, and the California Youth Authority's (now DJF's) Remedial Plan for Sexual Behavior Treatment Programs. The court also mentioned that in his capacity as the inspector general he had visited "the then CYA facilities and spent a good bit of time" and had conducted a number of investigations and audits.

The court made the following observations: "These were not touch-down visits; these were staying for lengthy conversations and discussions over periods of many days -- over periods of many years with the wards, with staff, with administrators.

In particular, relevant to this proceeding, I visited all of the sex offender treatment programs repeatedly along with other therapy groups and programs, but particularly relevant to this proceeding the sex offender treatment programs. I talked to the wards for hours collectively on this, as well as to Dr. Shumsky, who was referenced earlier in this proceeding and who has figured prominently in the development of the sex offender program at CYA, and I sat in a number of group sessions on a number of occasions, so I have some acquaintance with the subject area at issue here."

The Attorney General acknowledges the statutory and constitutional limitations on a court's consideration of information in sentencing. Penal Code sections 1203 and 1204 prohibit a court from considering information other than a probation report and the evidence introduced at a hearing in open court. Moreover, due process prohibits a court from considering any information without allowing the defendant an opportunity to respond. (*In re Calhoun* (1976) 17 Cal.3d 75, 84.) As a corollary, a court cannot receive and consider ex parte communication. (*People v. Shaw* (1989) 210 Cal.App.3d 859, 867.)

But the minor fails to acknowledge that probation is not a right and, consequently, the trial judge has wide discretion to grant or deny it. (*People v. Lopez* (1957) 151 Cal.App.2d 121, 123.) A judge's gratuitous statement that does not affect the sentencing process does not transgress the statutory or constitutional limitations on the court's discretion.

(*People v. Vatelli* (1971) 15 Cal.App.3d 54, 65.) As the Supreme Court stated in the venerable old case of *People v. Lichens* (1963) 59 Cal.2d 587: "[T]he trial court's single allusion to matters of knowledge outside the record concerning defendant's pattern of conduct was merely a brief introduction to his clear statement that his order to deny probation was based upon a weighing of the prosecutrix's testimony under oath against defendant's statement to the probation officer, both of which are matters in the record." (*Id.* at p. 589.) More to the point, "'[Where] a judge's statements as a whole disclose a correct concept of the law and its application, no secondary remarks should be deemed to have impeached his determination.'" (*Id.* at p. 590.)

Here, the judge's comments taken as a whole leave no doubt he thoroughly understood the law and its application. He considered all of the evidence presented at the dispositional hearing, including the probation report and all of the mental health reports. It is true he came to this delicate task more informed than the average judge because of the exposure he gained from serving as inspector general. But those experiences did not disqualify him from sentencing juvenile offenders; indeed, they probably gave him invaluable insights into the suitability of certain placements. But there is nothing in this record to suggest that the court violated the letter or the spirit of the law. Paying close and particular attention to the evidence before him, he committed the minor. We cannot say that his secondary commentary on his experience as inspector general

detracted from the implementation of his duty to exercise his discretion solely on the basis of the evidence before him.

DISPOSITION

The judgment is affirmed.

RAYE, J.

I concur:

SIMS, Acting P. J.

I concur in the result:

ROBIE, J.